

STATEMENT OF ERVIN CHAVEZ, PRESIDENT OF THE  
SHII SHI KEYAH ALLOTTEES ASSOCIATION  
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE AND  
THE HOUSE RESOURCES COMMITTEE

CONCERNING S.1315, A BILL TO PERMIT THE LEASING OF OIL AND GAS  
RIGHTS ON CERTAIN LANDS HELD IN TRUST FOR THE NAVAJO NATION OR  
ALLOTTED TO A MEMBER OF THE NAVAJO NATION, IN ANY CASE IN WHICH  
THERE IS CONSENT FROM A SPECIFIED PERCENTAGE INTEREST IN THE  
PARCEL OF LAND UNDER CONSIDERATION FOR LEASE

NOVEMBER 4, 1999

I. INTRODUCTION

Honorable members of Senate Committee of Indian Affairs and members of the House Resources Committee. My name is Shenan Atcitty. I work for the Nordhaus Law Firm in Washington D.C. Our firm is general counsel to the Shii Shi Keyah Allottees Association, and I am here to provide testimony on behalf of Ervin Chavez, President of Shii Shi Keyah Allottees Association. Mr. Chavez sends his regrets that he is not able to be here today. I am a member of the Navajo Nation, and am pleased to be here today on behalf of the Navajo allottees.

The Shii Shi Keyah Allottees Association and its Board of Directors support S.1315, "to permit the leasing of oil and gas rights on Navajo Allotted lands," and appreciate Senator Bingaman's efforts to address some of the pressing issues affecting the Navajo allottees.

The Shii Shi Keyah Allottees Association was formed in 1983 and has a membership of 2500-3000 individual Indian account holders and landowners. The land holding of the membership is scattered throughout what is known as the Navajo Checkerboard Areas, in the Four Corners region of New Mexico, Arizona and Utah. The Shii Shi Keyah Allottees Association is the primary organization that represents the interests and issues relating to Navajo allottees.

A group of frustrated Navajo allottees formed the Shii Shi Keyah Allottees Association as a result of the allottees not receiving royalty payments for years at a time, despite the fact that oil and gas wells, located next to their homes, were producing daily. When allottees received sporadic royalty payments, it was just simply a check, with no explanation of where or what lease these royalty payments were being made from.

S.1315 will address one of the pressing issues facing the Navajo allottees, that is securing oil and gas leasing opportunities for allotted Navajo lands where there is fractionated land ownership,

## II. BACKGROUND

Although the Navajo allottees have ownership interests in lands that contain vast mineral wealth, they have not had a meaningful opportunity to realize the benefit from their lands. The plight of the Navajo allottees is the result of failed federal policies that sought to breakdown traditional tribal land holdings and individually allot out parcels of land in an attempt to assimilate the Navajo people into mainstream society.

Following the U.S. Government's forced incarceration of the Navajo people at Fort Sumner in Southern New Mexico, the Navajo Tribe signed a treaty with the United States in 1868 establishing a permanent homeland, and our people were allowed to return to portions of our traditional homelands. The original reservation was subsequently expanded by executive orders from 1878 to 1907, and during that time grew from three million acres to more than eleven and one-half million acres in Arizona, New Mexico and Utah. These lands were mainly desert lands with scarce water supplies, therefore, the Navajos needed large amount of lands to successfully graze their sheep. *Pittsburg & Midway Coal Mining Company v. Yazzie*, 909 F.2d 1387, 1390 (10<sup>th</sup> Cir. 1990) (“Yazzie”).

By the early 1900's, Navajos living on public domain lands near the east and south portions of the Reservation were threatened by encroachment by non-Indian settlers who were driving Navajos off their lands and appropriating the Indian water supplies for themselves. *Yazzie*, at 1390. The Superintendent of the Navajo Agency recommended to the Interior Department that the federal government withdraw lands from the public domain for the purpose of protecting these Navajos and their livelihood of sheep grazing. *Id.* Navajo Tribal Chairman Chee Dodge also requested the Commissioner of Indian Affairs to provide additional lands for the protection of the off-reservation Navajos, explaining that the request was of the utmost importance for the Tribe. Although these Navajos were referred to as “off-reservation” Indians, it was well known that they had lived in the area for generations and had abstained from violence even though non-Indians were driving them from their homes. *Id.* at 1391.

During this period, the prevailing federal Indian policy was to break up tribal relations and integrate Indians into non-Indian communities in which they lived by allotting them lands in severalty as provided for by the General Allotment Act of 1887. *Id.* Consistent with the policy, the Interior Department set forth a proposal to the President to set aside land from the public domain for the purpose of protecting the Navajos. *Yazzie*, at 1391. In late 1907 and early 1908, President Roosevelt issued executive orders “withdrawing for sale and settlement” certain lands in New Mexico and Arizona and setting them apart as an addition to the Navajo Reservation. See Executive Order No. 709 (1907) and Executive Order No. 744 (1908).

Predictably, the New Mexico territorial government immediately pressured Congress and the Interior Department to restore the lands to public domain. *Yazzie*, at 1391-1392. In 1911,

before the allotment process was complete, President Taft issued Executive Order 1284 declaring all remaining unallotted lands added to the Navajo Reservation in Now Mexico to be restored to the public domain. *Id.* at 1392.

### III. CURRENT STATUS OF NAVAJO ALLOTMENTS

The legacy of the allotment policy is a "checkerboard" area of land holdings owned by individual Navajos, the federal government, the state of New Mexico, and private landowners all located in an area occupied almost exclusively by Navajo people from the Civil War to the present time. The nature of the checkerboard land holdings has created a jurisdictional nightmare, as well as obstacles for economic development opportunities. The problems confronting Navajo allottees are indeed severe. Though the New Mexico checkerboard area is known for its vast mineral wealth, for the last 12 years, \$7 million in leasing bonuses have been paid to the state and federal governments for leasing while only \$27,000 has been paid to Navajo allottees.

Almost immediately following the allotment process in eastern New Mexico, the federal Government illegally claimed ownership of the valuable minerals beneath a substantial number of the Navajo allotments. For many years, the federal government leased Navajo allotted mineral rights to various coal, uranium, and oil and gas companies to develop these resources and to pay royalties to the federal government and the state that were properly owed to the Navajo allottees. It was not uncommon for Navajos to be removed off their lands in favor of exploration and production of these minerals. In 1983, after years of injustice, a class action was filed in New Mexico federal court on behalf of these Navajo allottees for ownership to the minerals beneath their allotments. See, e.g., Mescal v. United States 161 F.R.D. 450 (1995). That case was eventually settled under the court's supervision and required the United States to relinquish its mineral rights to the Navajo allottees for unencumbered lands and to share with the allottees its portion of royalties received under existing leases.

Even though Navajo allottees have mineral rights to their property, there are still barriers that prevent Navajo allottees from realizing the economic benefits from their lands. Federal law requires that all persons who have an undivided interest in a particular parcel of allotted land must consent to a lease. Although this has had the unintended effect of defeating fraudulent leasing programs, see McClanhan v. Hodel, No. Civ. 83-161-M, 14 Indian Law Reporter, 3113 (D.N.M. 1987), appeals dismissed as moot. Nos. 87-116 and 87-1234 (10<sup>th</sup> Cir. 1988), in many cases, not all of the landowners of an allotment are even known. And the Bureau of Indian Affairs (BIA) is continuing to neglect its responsibilities to update the heirship information after probates are concluded. There are approximately 4,000 individual allotments covering over 750,000 acres of land with over 40,000 known owners. As many as 650 heirs have an undivided interest in a single 160 acre parcel of land. Many of these owners are unknown or cannot be located. Furthermore, the Navajo allottees continue to be concerned with the BIA's trust funds and record mismanagement practices as well as the decrease in oil and gas exploration and production over the last few years.

To address some of these problems, the Shii Shi Keyah Allottees Association worked with Senator Bingaman and his staff on crafting a bill to alleviate temporarily many of the concerns of the Navajo allottees. Accordingly, the bill will only affect oil and gas leases, and recognizes the need to

foster and protect harmony among Navajo families. Therefore, where an allotment has 10 owners or less, S.1315 would require 100% consent among the owners. To allow a simple majority to make land use decisions over the objections of the other owners will create conflict among the family. Similarly, if there are 11 to 50 landowners, at least 80% of the owners must consent to the lease. If there are more than 50 owners, at least 60% must consent to the lease. The Navajo allottees are adamantly opposed to a scheme that would require only a simple majority of the land ownership to consent to a lease. S.1315 provides a balanced approach to lease approval among Navajo families, including preserving the right not to engage in resource development.

With regard to allotted interests owned by a tribe, S.1315 recognizes the sovereign interests of the Navajo Nation, and provides that the Navajo Nation will not be a party to any lease agreement that is approved in accordance with its provisions. S.1315 preserves the Navajo Nation's ability to challenge the approval process.

The Shii Shi Keyah Allottees Association views S.1315 as a good start to begin addressing some of the critical issues facing Navajo allottees. The Navajo allottees believe that additional federal appropriations are necessary to develop tribal probate codes, implement tribal consolidation plans and work with allottees on estate planning and land consolidation.

Furthermore, the Navajo allottees seek congressional appropriations to implement a demonstration project to allow private financial institutions to administer Navajo allotted lands in a similar fashion to the way it administers family trusts for private oil and gas properties. In doing so, Congress would not have to deal with reducing the percentage of ownership necessary for lease approval as the only solution to the fractionation problem. An additional potential benefit would be addressing and resolving the issues surrounding the unconstitutionality of the escheatment provisions of the Indian Land Consolidation Act of 1982, both in its original form and as amended. See *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987). Furthermore, a private financial institution is equipped to handle trust assets and documents in a manner that comports with enforceable fiduciary standards, unlike the existing BIA system.

In conclusion, the Shii Shi Keyah Allottees Association is pleased to support Senator Bingaman and S.1315. While the Navajo allottees will continue to work on long term solutions to the fractionation problem, S.1315 is a positive step for Navajo allotment owners to obtain economic returns and benefits for their property, as well as meaningful input in the disposition of their land.